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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1922.~~ 1923

No. ~~320.~~ 31

R. H. ARNOLD, DOING BUSINESS AS R. H. ARNOLD COMPANY AND GLOBE INDEMNITY COMPANY, *Plaintiffs in Error,*

versus

THE UNITED STATES OF AMERICA FOR THE USE OF W. B. GUIMARIN & COMPANY, *Defendant in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY TO MOTION TO DISMISS OR AFFIRM.

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Plaintiffs in error deny that the writ of error was taken for delay only or that the questions on which the decision of the cause depend are frivolous.

On the contrary, they show that, as shown by the brief for defendants in error and the following, the

questions involved are serious and involve the question of jurisdiction of the courts of the United States, conflicting decisions of the Court of Appeals of the District of Columbia in the case of Arnold vs. Thompson & Spear Company, 279 Fed. 307, and the Circuit Court of Appeals in this case (R. 148) on identical facts; the failure of the Circuit Court of Appeals to properly apply the decision of this Court in the case of the United States vs. American Bonding Company, decided by this Court on December 12, 1921, as to trial by jury and other matters of substantive law, including the failure of the District Court and the Circuit Court of Appeals to follow the decisions of the State of South Carolina in matters of pleading and evidence.

(Note: The short time between the writer's return from vacation and time for filing answer to motion to dismiss has made it impossible to make the following comply with the rules governing briefs. It shows the nature of the case and the questions involved. Brief under the rules will be filed.)

Ellwood P. Morey,
Wm. Henry White,
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Attorneys for Plaintiffs in Error.

STATEMENT.

R. H. Arnold, trading as R. H. Arnold Co. (plaintiff in error), contracted with the Bureau of Yards and Docks, Navy Department, to construct a warehouse in the Navy Yard at Charleston, South Carolina. He gave bond under the Public Works Act (Act of Congress of the 13th of August, 1894, 28 Stat. L., chap. 283, p. 278, as amended by act of February 24, 1905, 33 Stat. L., chap 778, p. 811) with the Globe Indemnity Company (appellant in error) as surety. Guimarin & Co. (defendant in error) claims to have entered into a sub-contract with Mr. Arnold and sued him and the indemnity company upon this bond, in the District Court of the United States for the Eastern District of South Carolina, at Charleston. Other sub-contractors intervened (R. 149), but no testimony was offered in their behalf. Verdict was rendered for Guimarin & Co. against both defendants for $9,035.59 (R. 36), which the order of judgment (R. 9) shows was made up of the sum of $7,693.31, with interest from December 19, 1918. Final judgment (R. 11) was for $65,190, the full penalty of the bond, with $54.11 costs. The Circuit Court of Appeals in its opinion made it clear that this judgment for the full penalty of the bond was to be discharged by the payment of $7,693.31, with interest from December 9, 1918, and with costs of $54.11. The order of judgment (R. 10) also referred the cause to a master to take proof of the claims of intervening creditors with directions to report the testimony and the master's conclusions of law and fact. The Circuit Court of Appeals modified this order as to intervening creditors in these words (R. 152):

> "The judgment of the district court directing the reference to a master to pass upon the claims of the several petitioners, should be modified, and a jury trial awarded, to determine in a single trial the amounts due the several petitioners."

Further facts in more detail will be found under the following several headings:

ACCEPTANCE—CONFLICTING DECISIONS.

The Circuit Court of Appeals, in this case, and the Court of Appeals of the District of Columbia, in the case of Arnold v. Thompson & Spear Co., 279 Fed., 307, have rendered opposite decisions upon the same facts. U. S. v. Robeson, 9 Pet. 319, 327, was cited to both, followed by the Court of Appeals and not referred to by the Circuit Court of Appeals.

The sub-contracts sued upon in each court were upon the same printed form. Paragraph "second" thereof says (R. 5):

> "Second: That the General Contractor will, in consideration of the said covenants and agreement being strictly performed and kept by the said sub-contractor, as hereinabove mentioned, well and truly pay, or cause to be paid, unto the said sub-contractor the said sum of money above mentioned as the sub-contract price.
>
> In the Manner Following: In payments on the first of each month as the work progresses amounting to ninety per cent of the value of the completed work, as based on the above contract price, and the remaining ten per cent thirty days after the completion of this sub-contract and acceptance of same by the above named owner or architect."

The opinion of the Court of Appeals, pp. 309, *et seq.*, says that Mr. Arnold had a sub-contract with the corporation to do the plumbing and related work for $3,800.00, which was to be paid as follows:

> "On the 1st of each month as the work progresses * * * 90 per cent of the value of the completed work as based on the above contract price, and the remaining 10 per cent 30 days after the completion of this sub-contract and acceptance of the same by the above-named owner or architect."
>
> * * * "No doubt Commander Burrell had sufficient knowledge to enable him to speak as to the performance of the work, if that was the proper way to establish its performance; but it was not. The contract provided another way, and that should have been followed. The Supreme Court of the United States said a long time ago that:
>
> > 'Where the parties in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' United States v. Robeson, 9 Pet. 319, 326, 9 L. Ed. 142.

Cases supporting the same view of the law are Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; George A. Fuller Co. v. B. P. Young Co., 126 Fed. 343, 61 C. C. A. 245; Bush v. Jones, 144 Fed. 842, 75 C. C. A. 582, 6 L. R. A. (N. S.) 774. There is no claim here that

the corporation was prevented by time or accident from producing the necessary evidence.

If the work in question has been accepted by the Navy Department or by the Bureau of Yards and Docks, as the contract requires, there should be a record of it, and there should be no difficulty in proving that record by competent evidence. It has not been proven in this case, and therefore the court erred in not sustaining the motion to peremptorily instruct the jury to return a verdict for Arnold.

For this reason, the judgment is reversed, with costs, and the case remanded, with instructions to grant a new trial."

Our brief in the Circuit Court of Appeals said (Record citations, only, changed):

"There is no proof of progress. There is no proof of acceptance by the United States (the owner) nor by the Bureau (the architect). Witness Guimarin said the sub-contractor did all the work according to the specifications. Objection was overruled and exception allowed (R. 20). It was ground VI of defendants' motion to direct (R. 163. Assignments of Error Nos. 4 (n) and (w) cover this (R. 160). 'Liquidated damages' letter of April 16, 1920 (R. 47), shows the work was not finished and the September voucher deducted $6,457.50 for work the Government claims was not finished—evidently the same. Mr. Arnold agreed to pay when two things had happened—when the work, done as specified, had been accepted. Then only could Mr. Arnold get his pay from the Government. By this acceptance, only, could controversy be avoided as to whether the sub-contract work was done as specified. Witness Guimarin gave his opinion, only, under his own reading of the contract that the work was done, but neither he nor any one else said it was ever accepted.

U. S. v. Robeson, 9 Pet. 319, 327;
Sullivan v. Susong, 30 S. C. 323;
Sullivan v. Byrne, 10 S. C., 122;
Power & Co. v. Guarantee Co., 83 S. C., 100."

JURISDICTION.

The suit was brought under the Public Works Act on November 6, 1920, and the amended Complaint, filed November 20, 1920, says (R. 2):

> "That the contract between the United States Government and the defendant, R. H. Arnold, has been completely performed and finally settled, and final settlement and payment on the account of the said R. H. Arnold was authorized on the 17th day of April, 1920, and that more than six months and less than one year has elapsed since such completion and final settlement, and the United States has never entered suit on said bond."

The answer of each defendant says (R. 7, 8):

> "This defendant admits that the contract between the United States Government and him has been completely performed. He denies that final settlement and payment on account of the said R. H. Arnold was authorized on the 17th day of April, 1920, or at any other time and denies that more than six months or any other time and less than one year or any other time had elapsed since such completion and final settlement or since such final settlement and admits that the United States has not entered suit on said bond. This defendant says that the court is without jurisdiction because no final settlement has been made by the United States under said contract."

The Public Work Act authorizes suit on the bond by the United States within six months from completion

and final settlement of the contract and further provides:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit * * * be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States * * * against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That * * * it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later."

Plaintiffs in error contend that no "final settlement" was made prior to September 20, 1920 (if ever) and that this suit, commenced within six months (November), is premature; because the Supreme Court has said that

> "This act created a new right of action upon terms named; and hence that an action brought before six months had expired from the time of completion and final settlement of the contract 'could not be sustained.' "
>
> Ill. Surety Co. v. U. S., 240 U. S., 214, 217;
>
> U. S. ex rel. Texas Portland Cement Co. v. McCord, 233 U. S., 157.

What is meant by "final settlement" was also adjudicated in the Illinois Surety Co. case, as follows:

"* * * We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained."

Baker Contract Co. v. U. S., 204 Fed., 390;
Stitzer v. U. S., 182 Fed., 513.

The whole of the evidence is: 1, a letter from the Public Works Officer of April 20, 1920, to Mr. Arnold enclosing final voucher and quoting a letter from the Bureau to the Public Works Officer of April 16, 1920; 2, another of September 20, 1920; 3, thirteen monthly vouchers and a final voucher numbered fourteen; and 4, the testimony of the Public Works Officer. These are now considered.

1. The letter of April 20, 1920, is chiefly relied upon as showing final settlement on that day or on the date (April 16, 1920) of the letter of the Bureau therein quoted. This letter says that the Bureau says (R. 47) that:

"Liquidated damages * * * amounting * * * to $14,850 will be deducted from its stipulated price. Final payment under the contract on this basis is authorized."

Literally this letter says that the Bureau says that "liquidated damages for delays amounting to $14,850 will be deducted from the contract price of $217,300 and final payment of the balance of $202,450 is author-

ized. In so far as it purports to be an "administrative determination with respect to the amount due" (Ill. Surety Co. v. U. S., *supra*) it says that the Bureau has fixed the amount of the liquidated damages and asks for payment of another item of $216.10 and nothing else; and that is all that was done on April 16 or April 20. No other "record" was produced.

2. The vouchers are explained by the "General Provisions" of the contract as follows:

> "28. Schedule of prices.—Before the first payment becomes due the contractor shall submit to the officer in charge an itemized schedule of prices on prescribed forms furnished by the officer in charge. The officer in charge will check such schedule and forward it to the Bureau of Yards and Docks with his recommendation and the schedule, after it has been approved by the Bureau, will govern the preparation of monthly estimates. * * * The prices for material used in the permanent structure shall be the actual current market value as nearly as may be ascertainable. The difference between the total of the schedule of prices prepared as above indicated and the contract price shall be distributed among all the items of the schedule so that the total of the approved schedule shall in every case equal the total contract price. When the contract or any part thereof is based on unit prices and estimated quantities, these quantities and unit prices shall be employed in the schedule. Whenever the contract price is increased or decreased by supplementary agreement or order, the schedule of prices shall be amended to conform to the increased or decreased contract price." (* * * irrelevant provisions are omitted.)
>
> "29. Payments and reservations.—Vouchers will be prepared by the officer in charge of the

work as soon as practicable after the end of each month covering his estimate, according to the schedule of process, of all material delivered, material worked into place and work done to date. From such gross estimate will be deducted the next previous gross estimate, if any, and 10 per cent of the difference unless otherwise specified. The contractor shall certify to the correctness, justness, and non-payment of said vouchers, after which they will be forwarded to the Bureau of Yards and Docks for approval and for reference to the Paymaster General of the Navy for payment by check. Upon the completion of the contract the balance due on account thereof will be covered by similar vouchers, subject to any credits in favor of the Government: Provided, That the contractor shall first execute and deliver a final release to the Government, in such form and containing such provisions as shall be approved by the Navy Department of claims against the Government arising under or by virtue of the contract."

The contract between Mr. Arnold and the United States and these "general provisions" forming a part of it were omitted from the record. The record, page 19, shows that the contract, bond and specifications were admitted in evidence and marked "Exhibit 17," which purports to be copied on page 46; but the bond only is copied and the contract and specifications are omitted inadvertently. These must be supplied in the proper method.

That the items were numbered before the work was performed is shown by the monthly vouchers; *e. g.*, we find "items" 1, 2, 2a, 7 and 9, only, on the first voucher (R. 135); and voucher 2 adds "items 3, 8a, 11, 12 and 42 only (R. 123).

The total of the estimates of work done under each

item, when voucher 1 was prepared, is the total of voucher 1 (R. 135), and after deducting the 10 per cent reservation under the contract, the balance is the amount owing. The second voucher (R. 133) carries the estimate of work done under each item up to that time, including the work covered by the first voucher, and the total is called the "total gross estimate." From this is deducted the previous gross estimate, ten per cent reservation of the balance and the sum remaining is owing; and so on through subsequent vouchers. Each "item" grows until it equals its original estimated cost; *e. g.*, Item 38, elevators, appears first on voucher 8 (R. 101) as delivered, which completed the item, and the same total is in each later voucher. Item 38a, for placing the elevators, appears in voucher 9 (R. 95), with estimated cost of $300, 45 per cent completed and $135 allowed. Voucher 10 shows 75 per cent; voucher 11 shows 90 per cent, and voucher 12 and subsequent ones show 100 per cent and the total allowance. When completed in voucher 14, the total of these "items" equals the contract price of $217,300 (R. 52).

As these vouchers are the only means disclosed in evidence by which the United States fixed the amount owing the contractor, it is important to note that voucher 13, dated January 2, 1919, contained a total of these "items" of $216,440 (R. 60). The next (No. 14—Final Voucher) was not made up and forwarded until September 20, 1920, and the total is $217,300, the stipulated or contract price (R. 52). This difference of $860.00 is neither "fixed" nor "determined" nor explained anywhere else.

The contract (par. 17) also gave the United States the right to make "*changes*" by increasing or decreas-

ing the work, the decrease or increase in the compensation to be fixed by the United States—by the officer in charge or by a board of not less than three officers as the price was less or more than $500.00. Eight of these "changes" were ordered and lettered "A" to "H" inclusive, to distinguish them from the numbered "items" of work specified in the contract, and they were kept separate on the vouchers.

"Change A" began with $352.50 on voucher 4 (R. 123) and became $472.50 on voucher 8 (Aug. 1, 1918, R. 102), and so appears in each subsequent one. "Change B" also began with voucher 4 (R. 123), grew to $2,858.83 on voucher 11 (Nov. 1, 1918, R. 83), and so appears on each subsequent one. "Change C" began with voucher 8 (R. 102), grew to $259.90 on voucher 12 (Dec. 2, 1919, R. 68), and so appears subsequently. "Change D" began on voucher 11 (R. 84), became $4,903.70 on voucher 12 (Dec. 2, 1919, R. 69), and later appears the same. "Change E," a decrease of $6,225, was fixed in voucher 12 (Dec. 2, 1918, R. 69), as was also "Change F," an increase of $328.35, in voucher 12 (Dec. 2, 1918, R. 70).

"Change G" an increase of $742.50 and "Change H" a decrease of $6,457.50 appeared for the first and only time in Voucher 14—Final Voucher, forwarded September 20, 1920 (R. 48). The evidence discloses no other time nor manner of "determining" these amounts. This makes the action premature.

Another item appears on the Final Voucher (September 20, 1920), as follows (R. 53):

> "Amount due contractor representing difference between bid price and purchase price of X structural and reinforcing steel authorized by Bu. Y. & D. Ct. 2469, Nov. 4, 1918."

It is not contended that on November 4, 1918, the sum of $3,467.08 or any other sum was fixed; on the contrary, the "difference" was in the price per pound and the number of pounds could not be known until the work was done. The Public Works Officer said he had made a computation prior to September 20, 1920, but if he did he kept it to himself. It was not sent to Arnold & Company nor to the Bureau and is not in evidence. Until this sum was "determined" and taken into the account on September 20, 1920, there could be no "administrative determination" of any amount the United States was "bound to pay."

Arnold & Company used cement belonging to the Navy Yard. In various vouchers up to and including No. 13 (Jan. 2, 1919), he is charged with cement, credited with sacks returned and the balances are deducted from the sums owing. The aggregates on the 13 vouchers are: Cement, $21,825.74; sacks returned, $3,375.00. Voucher 14 (Sept. 20, R. 53), shows: Cement, $23,157.80; sacks returned, $3,590.00. There is no evidence that these new amounts were "determined" by anyone prior to September 20, 1920. The differences are—for cement, $1,332.06; for sacks, $215.00; a net total of $1,117.06, affecting the balance owing.

Two small items on Final Voucher 14 are significant. The item of demurrage, it is affirmatively shown by this voucher, was not "authorized" until September 7, 1920 (R. 54). While the Public Works Officer had asked for the overdraft of $216.10, by his letter of April 20, 1920 (R. 48), he was not "authorized" finally in respect to it until September 7, 1920 (R. 54). *Since these items appear on Voucher 14, it could not have been finally prepared until after September 7, 1920,* and until then no one had "determined" the amount

owing. Until all of the items were "determined" there was no "final settlement;" and it is not safe to say that the failure to determine a small one is immaterial, for what is a small one? Is $19.00 small? Then how about $742.50, or $6,457.50?

The Supreme Court has said that the time limit fixed by this Act is more than a statute of limitation. It is a right given upon condition—a question of jurisdiction, but if one sues on a promissory note one little day too late, his action is lost.

3. The letter of September 20, 1920, to Arnold & Company (R. 48) reads:

> "1. There is enclosed herewith final voucher No. 14 covering balance due you, including reservations under the above contract and deducting liquidated damages and other claims of the government as authorized by Bureau of Yards and Docks letters No. 2469 of April 16, 1920, and September 7, 1920. There is also enclosed in quadruplicate, final release of the above contract. It is requested that you sign the original Voucher No. 15 as well as three copies of the final release and return the came to this office where the voucher will be placed in the proper channel for prompt payment. You may retain the green copies of the voucher and the fourth copy of the final release for your files."

This is the first and only time that any one said officially or otherwise, or "fixed" by "public record" or off the record, what is the "balance due" or "amount due," or the amount "which it (the Government) was bound to pay." Evidence fails to show any approval at any time by the "proper channel" or by "Bureau of Yards and Docks" (contract, par. 29). The "method of settlement" (R. 22) contemplates written

"instructions for the preparation of final voucher," but they are not produced and the date is not shown, unless it be September 7, 1920 (R. 54), and this is within six months of the bringing of the suit in November. The "written report to the Bureau of Yards and Docks, that the work is completed" and asking "the Bureau's instructions for the preparation of final voucher" (R. 22) was not produced and its date is not shown.

4. The testimony of the Public Works Officer is this: He went on duty at Charleston, January 5, 1920 (R. 24), and is in custody of the records (R. 23). He produced Exhibit 18, which is a mere copy of his letter to Mr. Arnold of April 20, 1920 (R. 24, 47), and was objected to on that ground and that no notice was given to produce the original (R. 24). He had a retained copy of the final voucher and said he would "furnish additional copies of the final voucher showing exactly all credits allowed" (R. 27). Before September 20, 1920, monthly vouchers had been sent to Mr. Arnold, but none "for the purpose of a final voucher" (R. 27). The witness then said (R. 29, *et seq.*), that the first three or four pages of the final voucher forwarded September 20, 1920, were "typed in April" and the last page in September. After that there was no revision of the *basis* of settlement. He called on Mr. Arnold to make good sums for utilities furnished, reported the facts to the Bureau with recommendations that he be authorized to make deductions on the final voucher and the Bureau approved by letter of September 7, cited on the last page. Mr. Arnold did not have copies of these letters, but witness had demanded the sums from Mr. Arnold. These deductions were "less over-expenditures on contractor's

special deposit (authorized by Bu. Yd. & D. let. 2469, Sept. 7, 1920), $216.10. Less demurrage chargeable to contractor paid by Supply officer (authorized by Bu. Yd. & D. let. 2469, Sept. 7, 1920), $19.00."

But the witness also said the "basis" of the special deposit of $216.10 was in the contract and not in the April 16 letter (R. 33); that changes G and H and the steel item do not appear on vouchers previous to September 20 (R. 31) and said (R. 34):

> "Commander G. S. Burrell (answers from the floor). The items of the contract require the contractor to furnish everything. Then the credit was taken, for the cement, month by month, as furnished; and I find entries on a number of vouchers of the several amounts, including Feb. 3 voucher, and Feb. 28,—July, August, September, October, November, all 1918."
>
> Court: In which the cement is mentioned. Not the other, was it?
>
> A. The other was for structural steel. It was specified before letting the contract that the contractor should name the price. quotation, which he had obtained from the manufacturers, and on which his proposal to the Government was based. That the Government reserves the right to either furnish him the steel in kind, and thereby give him credit for the steel, or else to instruct him to buy his steel in open market; in which case the Government would pay him the difference between the original quotation obtained from the manufacturers, and the price he actually had to pay for the cement (steel). That would protect the contractor on a rising market. The Public Works Officer was instructed in the beginning that that could be accounted for in the final voucher; so that that item occurs in the final voucher only.

Court: Was it considered in the memorandum fixing the amount, of the 16th of April, 1920?

A. No, sir. That was something that had been determined in letting the contract, and its status was not affected by the April contract. (Memorandum.)

Mr. White: But the amount of it was fixed in the final voucher for the first time?

A. Yes, sir.

Mr. McDonald: Commander, did the item of structural steel—had that item been actually computed in your office on April 16?

A. It had been."

The burden of proof is upon the plaintiff to show by matter of public record and by the best evidence that more than six months and within one year prior to filing suit on November 6, 1920, the Government determined the amount it was bound to pay Mr. Arnold. September 20, 1920, is too late, and until that day when the final voucher was sent, no such amount has been shown by any record nor by the best evidence for these reasons:

(a) While the witness *says* the first pages of the final voucher were "typed" in April, it was never approved by the Bureau as required in paragraph 29 of the contract, nor as required by the "method of settlement" as stated by him (R. 22).

(b) His "written report" is not in evidence; neither is the action of the Bureau, unless that be the quotation from the letter of April 16, 1920 (R. 47). This is only a copy of the letter to Arnold. The original was not called for and was inadmissible, as hereafter shown.

(c) The letter, if it be in evidence, fixes one item of charge—for liquidated damages—and does no more.

(d) His testimony shows careful selection of words. He says the *basis* of settlement was fixed, etc., yet he admits that "Change G," "Change H," steel, special deposit and demurrage items appeared in the final voucher for the first time and that the last two were not "authorized" until September 7, 1918. While he says that the steel item is fixed by the contract and that he had the computations in his office, "the amount of it was fixed in the final voucher for the first time," and no action by the Bureau is shown.

The totals not fixed, therefore, prior to September, are:

Totals of original "items" changes from $216,440, Jan. 2, 1919, to $217,300, Sept. 20, 1920 (R. 60), an increase of.....	$860.00
(Note: No intervening date is shown when this was fixed.)	
"Change G" appears for the first time Sept. 20, as fixed at.....	742.50
"Change H" appears for the first time Sept. 20, as	6,457.50
(Note: The contract required these two sums to be fixed by Boards of Officers. These awards are not shown nor are the dates given.)	
Steel, computations on which were never disclosed nor approved, and the amount of which was fixed in the final voucher for the first time (R. 35).....	3,476.08
Totals for cement changed from $21,825.74 total up to voucher 13 (Jan. 2, 1919), to $23,157.80 on September 20 (R. 53), and no approval nor previous computation shown, a change of.....	1,332.06

Total for cement sacks returned, same facts, a change of	215.00
Over-expenditures of special deposit, not "authorized" until Sept. 7, and authority not shown by best evidence.....	216.10
Demurrage, not "authorized" until September 7, and authority not shown by best evidence	19.00
Total Changes.....	$13,318.24

The total found owing Mr. Arnold in the final voucher is only $4,725.24 (R. 54). At no previous time was any amount fixed or determined by anyone, nor, so far as the record shows, was ever attempted to be fixed. Until each of the above items were determined, the amount owing could not be determined.

It is conclusively established therefore—

1. "The time of this determination when so far as the government was concerned, the amount which it was finally bound to pay," was September 20, 1920, and within six months of the bringing of this action.

2. No amount was fixed proir to that day.

3. Before September 7 two items had not been authorized (utilities $216.10 and demurrage $19.00).

4. Before September 20, no date is shown when changes G and H were fixed ($742.50 and $6,457.50) although fixed of record by awards of Boards under the contract, not in evidence; therefore September 20 is the earliest date shown when these amounts were "determined."

5. Before September 20, no date is shown when the amount of allowance of Mr. Arnold's claim for steel was fixed. Witness Burrell says that he had the computations in his office; but this is one of the things he had to report to the Bureau and have approved (R.

22). Neither his report nor the Bureau's action is in evidence nor is the date of either given. He said the first three or four pages of the voucher were "typed" in April, but typing a voucher at the Navy Yard is not approving the amount by the Bureau and no date of approval of anything by the Bureau is shown except liquidated damages on April 16 and special deposit and demurrage charges on September 7. The letter of September 7 is not in evidence.

6. The total of original items was not allowed, by any "record" or word of testimony, prior to September 20, when for the first time it equals $217,300, the contract price. The largest "amount" prior was $860.00 less.

7. The same is true for the charges for cement and credits for sacks; and the amounts involved are $1,332.02 and $215.00.

Putting it another way, voucher 13 showed that on December 31, 1918, the United States owed Mr. Arnold $981.76 (which it paid) plus 13 reservations amounting to $17,928.12, and reserving on each voucher the liquidated damages question. These damages were fixed April 16, at $14,850.00, which left $3,478.12 owing until September 7, when $216.10 and $19.00 were charged and this is the only possible "amount" shown to have been "fixed by public record" until September 20 when the other claims and charges appear in the "final voucher" affecting a total of $13,318.24 one way or another, and finally fixing $4,725.24 as the amount the United States was bound to pay; and *there is no record in evidence that even this sum was ever approved by the Bureau.*

Motion of defendants to instruct the jury to return a verdict for defendants on this ground was overruled

with exception. Verdict for plaintiff was directed. Exception was granted and error No. IV (w and x) assigned (R. 163 and 164).

We also believe the court erred in trying this question of jurisdiction, which is in abatement, with the case on its merits.

> *Kirven v. V. C. C. Co.*, 145 Fed. Rep., 288;
> *Greensboro v. So. Paving & Con. Co.*, 168 Fed. Rep., 880.

Cases cited in brief for defendants in error follow:

In *U. S. v. Robinson*, 130 C. C. A., 434, the Court said:

> "The date was, therefore, fixed relatively to complete performance of the contract and *final settlement thereof*. We take it that these italicized words refer to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not and records that decision in some orderly way."

The letter of April 16, 1920 (R. 47), said:

> "The building was substantially completed November 30, 1918, so as to allow the use of it by the Government, and that date will accordingly be treated as that of completion for the purpose of the damage clause, although the work was not then entirely finished and certain items of it were not substantially eliminated from the contract."

That fixed the liquidated damages, only. After this other items aggregating thousands of dollars were fixed for the first time.

From the Robinson case the following is quoted from brief for appellee in error, p. 13:

> "Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the sub-contractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract."

September 20, 1920, was the first time Mr. Arnold was told what was due him and was the first opportunity offered him to "dispute" anything. We have never contended and do not now contend that his conduct has anything to do with it.

In *U. S. v. Title Guaranty Co.*, 166 C. C. A., 320, the final voucher was sent (as here) to the contractor and then forwarded to the Bureau and there approved. *The date of this approval by the acting chief of the Bureau was held to be the date of final settlement.* In the case at bar it is not shown that the final voucher was ever sent to the Bureau, nor that it was ever approved there, but it is shown that it was not completed until September—two months prior to filing this suit.

In U. S. v. Arnold, 268 Fed., 130, the Court found that the building was completed July 30. The final voucher, delivered August 15, showed July 30 as the "date of delivery of service" just as the final voucher in this case shows April 17 as the "date of delivery of service." This may or may not be the date of *com-*

pletion of the work. It is not the day of "final settlement." In the Connecticut case the court found only trivial items of debit changed by the Bureau after July 30 and ignored them in plain English. Here the items of debit and credit after April 17 involve thousands of dollars.

Under the head "Department Construction" cases are cited to the effect that weight will be given by the Court to departmental construction of a doubtful statute. This Court has construed this statute, and a Bureau cannot, by saying a certain day is the day it finally settled a matter, make it so, where the plain facts show it settled but one on that day and left many unsettled. It is not a question of construction. It is a question of undisputed fact.

Neither can this question be decided by answering the question of whether Mr. Arnold is hurt. The consent of all parties could not give the court jurisdiction within the six months, even if it were admitted that the United States had no claim.

U. S. v. McCord, 233 U. S., 157, 159, 163, citing Stitzer v. U. S., 105, C. C. A., 51, 182 Fed., 513.

Nor can we now be concerned with Guimarin's condition. The courts of general jurisdiction in the District of Columbia have been and are open. He sought this special, limited procedure and at the trial defendants were committed to September 20. He could have brought another action within the limited period.

THE BEST EVIDENCE.

Exhibit 18 (R. 47) is a copy of a letter of April 20, 1920, from witness Burrell to Mr. Arnold. No notice to produce was given, objection was overruled, exception allowed and the copy was admitted (R. 23).

This copy when produced also shows that it copies part of a letter of April 16, from the Bureau to the Yard at Charleston, the original of which was produced. (R. 23.)

Assignment of Error No. IV (p) R. 47 and 161) covers this and the rule is elementary.

Greenleaf on Ev. Sec. 84, *et seq.;*
Main v. Aukam, 4 App. D. C., 51;
Mfg. Co. v. Iron Works, 75 S. C., 340.

This is the writing chiefly relied on to prove "final settlement" which the verdict says was made April 16, 1920 (R. 9).

Witness Heyward said (R. 14) that a copy of Exhibit No. 2 (R. 37) was mailed to Mr. Arnold; that is, he prepared it, signed it and he presumed that his bookkeeper or stenographer mailed it—he didn't; but he received a reply and this is Exhibit 3, purporting to be signed by Rosenheim as office manager (R. 38). No signature was proven; objections were overruled, exceptions allowed and the writings admitted (R. 14). Assignment of Error No. IV (f) covers these (R. 158). The record shows no notice to produce the original of the statement; no proof of signature of Rosenheim nor of his authority to do anything; the letter says he has "no authority to act in the matter"; and these are the basis for the court's finding that an account stated has been proven (R 20) and without which the plaintiff has not proved the case on the merits.

Exhibits 4, 6, 8 and 10 are called carbon copies of alleged letters from Guimarin & Co. to Mr. Arnold. The record shows neither proof of mailing any of them nor notice to produce nor call for originals 4, 6 or 8, nor that they are even copies. The replies (Exhibits 5, 7, 9 and 11) are not signed by Mr. Arnold.

There is no proof of the signatures of the alleged senders, Rosenheim, Gunezy and Stum, nor of the authority of either of them. Assignments of Error Nos. IV (g) and IV (h) cover them.

Exhibit 12, witness Heyward said is a copy of a letter and estimate he sent to Mr. Arnold. Witness did not mail it (R. 17). Error No. IV (i) is assigned (R. 159).

The witness said that Exhibit 13 is signed by Ralph E. Homan (R. 17) who is "connected with the R. H. Arnold Company."

> Mr. McDonald: What was his connection with them?
>
> A. I couldn't tell you that. He was in Charleston here for quite a while, on construction work, I presume.
>
> Objection.
>
> Court: He was connected with the work here?
>
> A. Yes, sir.
>
> Court: You had correspondence with him as such?
>
> A. I had correspondence with him.

This was all the evidence. Error No. IV (j) is assigned (R. 159).

Exhibit 14, seven letters, six of which purporting on their faces to be signed by Rosenheim as office manager of defendant Arnold, were admitted without proof of either signature or authority (R. 18). The seventh purports to be signed by "H. G. Lehrbach, Assistant Engineer, U. S. Navy." Error No. IV (k) covers this (R. 159).

Exhibits 15 and 16 are exactly like Exhibit 14 except the supposed signer is Homan; there are ten letters and the error is No. IV (l).

STATED ACCOUNT.

The Court held (R. 20):

> "Court: (To Mr. White). As at present advised, I think I will charge the jury that your non-objection to the amounts binds you. He sent you a complete statement of the accounts one year and eleven months before action was brought. Under the general rule, that is an acceptance, unless you objected to in some way. The rule is two years, but not limited—it depends somewhat on circumstances. I think the twenty-three months, and he had to bring a suit, would be sufficient admission."

The statement is Exhibit 2 (R. 37) which witness Heyward said (R. 14) was a carbon copy (R. 15) of a statement he signed and which he presumed his bookkeeper or stenographer mailed; but he didn't mail it. He received Exhibit 3 (R. 38) purporting to acknowledge receipt but not signed by Mr. Arnold, no signature being proved and the author disclaiming, in the letter itself, "authority to act in the matter." Exhibits 4 to 9 show (even if admissible) that matters relating to the account had not been determined, that information from and action by the Government (R. 38) were prerequisite and the proof ends May 16, 1916, with Arnold & Co. saying it could not say whether the account is correct for these reasons. It is not shown that acceptance of the work by the Government was made. The court was in error in finding acceptance of the account by twenty-three months' silence. Either the statement and letters are inadmissible, which leaves no proof of an account stated, or the letters show affirmatively that there was no acceptance or im-

plied agreement. If Mr. Arnold is bound by letters written by alleged clerks or bookkeepers, he is entitled to the disaffirmance shown in their letters.

Charlotte O. & F. Co. v. Hartog, 85 Fed. 155;
Wakefield v. Spoon, 100 S. C. 106.

The following is elementary:

> "The rule is the same in principle at law; a settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness, or mistake, in law, or in fact."
> Perkins v. Hart, 11 Wheat 256.

> "When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission or mistake, and in these respects he is nowise concluded by the admission implied from his silence after it was rendered."
> Wiggins v. Burkham, 10 Wall. 129, 132.

This burden was taken from our shoulders by plaintiff's proof which shows affirmatively mistakes in debit items for changes C, D, and F (R. 37). He did not plead and his counsel did not assert a stated account. He did undertake to show the "value" of these changes by showing the amounts allowed by the Government to Mr. Arnold and his counsel said (R 26):

> "Mr. McDonald: The purpose of this line of inquiry is to show the amount which the Government allowed Arnold on these particular changes, with a view to showing that our estimates were reasonable and fair valuations."

We have shown elsewhere that the statement, complaint, verdict and judgment contain and are based on

the amounts awarded to Arnold by the Government whereas the amounts owing plaintiff by Mr. Arnold are necessarily different, because Mr. Arnold is entitled to estimated actual cost at the time of doing the work plus ten per cent profit, while plaintiff is entitled to fair valuations based upon the sub-contract price for the whole of the original sub-contract work. The only other evidence is that witness Guimarin said that the charge of $3,383.50 (R. 37) is "a fair value for that work" as of May 11, 1918, when he made up an estimate (R. 40, 21). Alleged letter of authority to do the work says (R. 41):

> "Compensation for same will be made you in accordance with the original contract between us."

There appears no proof of value of the charges for changes C and F except the sums allowed by the Government to Mr. Arnold. This is a clear mistake.

VARIANCE.

The *complaint claims* for additional work its value "fair valuation" (R. 2). The *right proven* is to "fair valuations, using the contract price on the whole of the sub-contract work, as a basis for computing such valuations" (R. 5, par. "Third"). The *sum proven* and included in the directed verdict is the sum allowed Mr. Arnold under his contract with the United States (R. 26, 28). This is a fatal variance, because:

(a) Defendant did not agree to pay plaintiff what he received from the Government; neither did plaintiff agree to accept it nor do the work for it.

(b) The basis of compensation was wholly different. Plaintiff was to receive "value." Defendant was to receive estimated actual cost plus 10 per cent. It was to receive "Fair valuations, using the contract price on the whole of the sub-contract work ($9,950) as the basis." Defendant was to receive "estimated actual cost * * * at the time of such estimate," (Oct. 25, 1919). Fluctuating prices, up or down, affected the price the Government was to pay defendant, but not the price he was to pay plaintiff. Suppose the sub-contract had been for the brick work and the Government had increased the size of the building so that twice as many bricks were required. Plaintiff would have the right, upon performance, to twice $9,950—no more, no less. Defendant's compensation was upon an entirely different basis. It was left to a Board, was subject to fluctuating prices and carried an additional percentage of profit.

The fact that the alleged sub-contract made defendant's contract with the Government and the specifications a part was for the sole purpose of specifying the work to be done and the manner of doing it and does not give plaintiff the right to defendant's compensation, *a fortiori,* when a different compensation to plaintiff is specified in the sub-contract. This is a fatal variance.

Sheehy v. Mandeville, 7 Cranch 208;
Fitzsimmons v. Guanahani Co., 16 S. C. 192;
Hursey v. Surles, 91 S. C. 290.

The only other proof is of "reasonable value" as of the time of doing it and not based upon sub-contract price, and agrees with the allowance to Arnold & Co.

PROOF OF SUB-CONTRACT.

Defendant R. H. Arnold Co's. signature was admitted by him, but that was not admitted by his co-defendant and proof of his signature was necessary to affect the interest of his co-defendant.

Kolb v. Jones, 62 S. C. 193.

The alleged signature of R. H. Arnold Co. purports to be witnessed by F. Golden (R. 7). He did not testify and proof by him was indispensable.

Chamberlayne's Handbook on Evidence, 15th Ed., sec. 569.

Testimony of Cooper, witness to plaintiff's signature, was shown to be unobtainable (R. 12), but absolutely nothing was shown about Golden. His signature was not proven. He seems to have been overlooked.

Swancey v. Parish, 62 S. C., 240;
United Grocery Co. v. Donnelly, 93 S. C., 580;
Merck v. Merck, 89 S. C., 347;
Russell v. Tunno, 11 Rich. Law, 303;
Martin v. Bowie, 37 S. C., 102.

Under the above cases the court will find that the proof of Mr. Arnold's signature was not by the best evidence and further that the witness Heyward, who undertook to identify it, had not sufficient knowledge and he was too uncertain (R. 13). Objections were overruled, exceptions granted (R. 12, *et seq.*) and Errors Nos. IV (c) and (d) were assigned (R. 157).

ONE JURY TRIAL.

Assignment No. 3 says that the Circuit Court of Appeals erred (R. 157):

"3. In affirming the judgment on a jury trial in favor of Guimarin & Company and awarding a new and separate jury trial to determine in a single new trial the amounts due the several petitioners other than Guimarin & Co."

Objection was duly made (R. 11).

While the Circuit Court of Appeals held (R. 152),

"That a jury should have been impaneled to try and dispose at a single trial, of all the petitioners' claims, as well as that of the plaintiffs,"

citing the case of *Miller v. American Bonding Company,* decided by this Court, December 12, 1921, and said that the judgment

"should be modified, and a jury trial awarded to determine in a single trial the amounts due to several petitioners";

nevertheless, what the Court ordered was that

"judgment should be entered in favor of the U. S. for the sum of $65,190.00, the penal sum of the bond referred to, to be discharged by the payment to the said Guimarin & Co. of $7,693.31, with interest from the 19th of December, 1918, until paid, together with costs of $54.11, it appearing that plaintiffs and petitioners' claims combined do not exceed the penal sum of said bond * * * and that the several petitioners upon ascertainment of the amounts respectively due them should be entitled to like judgments, the total judgments, including that of the plaintiffs herein, not to exceed the penalty of the bond.

"The decision of the lower Court as herein modified, will be approved and affirmed."

We have, therefore, a verdict of a jury by direction of the Court in a trial of the claim of the one petitioner, only; a judgment on the verdict; an opinion that this is wrong because the claims of all petitioners should have been tried in one trial before the same jury; that judgment affirmed with direction that a new trial before a new jury be had of the claims of all the other petitioners. This required two trials before two juries and the error is plain.

ELLWOOD P. MOREY,
WM. HENRY WHITE,
JOHN I. COSGROVE,
Attorneys for Plaintiffs in Error.

(28810)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 320.

R. H. ARNOLD, DOING BUSINESS AS R. H. ARNOLD COMPANY, AND GLOBE INDEMNITY COMPANY, PLAINTIFFS IN ERROR.

versus

THE UNITED STATES OF AMERICA FOR THE USE OF W. B. GUIMARIN & COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

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MOTION TO DISMISS OR AFFIRM AND BRIEF.

Now comes the defendant in error, the United States, to the use of W. B. Guimarin and Co., by its counsel, Frank G. Tompkins and M. G. McDonald, and moves the Court to dismiss the writ of error herein and affirm the judgment of the United States Circuit Court of Appeals for the Fourth Circuit upon the ground that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such character as not to justify extended argument.

The grounds of this motion, the statement of the case and the argument thereon, are more fully set forth in the accompanying brief, all of which is herewith respectfully submitted.

FRANK G. TOMPKINS,
M. G. MCDONALD,
Attorneys for Defendant in Error.

To Messrs. Wm. H. White, Elwood P. Morey, Logan & Grace and Jno. I. Cosgrove, Attorneys for Plaintiffs in Error:

YOU WILL PLEASE TAKE NOTICE that on Monday, the 16th day of October, 1922, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Attached hereto, please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause

to the summary docket if the Court should desire to hear argument thereon.

FRANK G. TOMPKINS,
M. G. MCDONALD,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief, is hereby acknowledged, this ..... day of September, A. D. 1922.

.....
.....
Attorneys for Plaintiffs in Error.

STATEMENT.

On October 3, 1917, R. H. Arnold entered into a contract with the United States to construct a storehouse at the Navy Yard at Charleston, S. C. In accordance with the Act of Congress of August 13th, 1894 (28 Stat. U. S., 278), as amended by the Act of February 24th, 1905, (33 Stat. U. S., 811), he gave bond in the sum of $65,190 with the usual conditions, the Globe Indemnity Company being surety. W. B. Guimarin & Company, in November, 1920, commenced this action under the statute in the District Court against Arnold and his surety, for the recovery of the balance due under a sub-contract for plumbing, heating, roof drains and fire service, alleging that Arnold's contract with the government had been completely performed and was finally settled on April 16th, 1920. Various other sub-contractors and materialmen intervened. The cause was tried in June, 1921, and resulted in the direction of a verdict in favor of Guimarin & Company for $9,035.59, and directing the entry of judgment for the penalty of the bond. It was further ordered that the claims of the various intervenors be referred to the standing master "to take proof * * * and report to this Court upon each of the said claims severally, together with the testimony offered for and

against the same and his conclusions of law and fact thereon."

The case was then taken upon a writ of error, to the Circuit Court of Appeals for the Fourth Circuit, and the judgment of the District Court, insofar as the claimant, Guimarin, was concerned, was affirmed, but so much of the judgment as ordered a reference upon the intervening claims, was set aside under authority of *Miller vs. American Bonding Co.*, 66 U. S. L. Ed., 123. That decision was rendered on December 12th, 1921, subsequent to the judgment of the District Court, and after the cause had been argued in the Circuit Court of Appeals.

ARGUMENT.

Plaintiffs in error reassign as error all of the twenty-six assignments of error that were before the Circuit Court of Appeals, together with four additional assignments, making thirty-two in all. These assignments raise the same questions in different form, and, therefore, in discussing them, we shall follow the grouping adopted by the plaintiffs in error and the defendant in error in the Court below, and as set out in the opinion of Judge Waddill of that Court.

CONSTRUCTION OF ACT.

The construction of the Act of Congress under which this suit was brought necessarily depends to a large extent upon the purpose of its enactment. Its purpose was two-fold, namely, to protect the priority of the United States, and to provide for the prompt payment of laborers and materialmen. *Illinois Surety Co. vs. U. S.*, 240 U. S., 214. Hence, the Act being remedial, its construction should be liberal.

> "The Act is intended to be highly remedial. Its purpose is simple and beneficial. It is to give a remedy to material men and laborers on the bond of the original contractor and a reasonable time to enforce it." *Alexander Bryant Co. vs. N. Y. Steam Fitting Co.*, 235 U. S., 327.

"The purpose of the Act was to provide security for the payment of all persons who provide labor or material on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this Court have made it clear that the statute and bonds given under it must be construed liberally in order to effectuate the purpose of Congress as declared in the Act. In every case which has come before this Court where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act. Technical rules otherwise protecting sureties from liability have never been applied in the proceedings under this statute."

Illinois Surety Co. vs. John Davis Co., 244 U. S., 376.

"Statutes are not to be so literally construed as to defeat the purpose of the legislature."

Hill vs. American Surety Co., 200 U. S., 197.

"Such a contract (bond) should be interpreted liberally in favor of the sub-contractor, with a view of furthering the beneficent object of the statute." *U. S. F. & G. Co. vs. Golden Pressed and Fire Brick Co.*, 191 U. S., 416. See also *U. S. vs. Mankin*, 215 U. S., 533.

"The Act and bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

Brogan vs. Nat. Surety Co., 246 U. S. 257.

The question of jurisdiction must, therefore, be determined in the light of the highly remedial nature and beneficent purposes of the Act.

JURISDICTION.

The only question to be determined under this head is whether or not the contract between Arnold and the United States had been "finally settled" six months prior to the bringing of this action. It is conceded that the contract

had been completely performed, but the correctness of the ruling of the District Court and of the Circuit Court of Appeals that the contract was finally settled on April 16th, 1920, is questioned, the contention of plaintiff in error being that there was no final settlement and hence that the action was premature and the Court without jurisdiction to try the same.

Commander G. S. Burrell, U. S. Navy, the Public Works Officer at the Charleston Navy Yard, in charge of the contract in question, testified as follows (p. 22):

> Mr. McDonald: What is your official position? A. I am the Public Works Officer of the Navy Yard Station, Charleston, S. C., and of the Sixth Naval District.
>
> Q. How long have you been in the service? A. Fourteen years next month.
>
> Q. Will you explain to the Court and jury the method of settlement of public contracts as carried on by your department?
>
> Objection. Overruled.
>
> Exception.
>
> A. After the work is physically completed, the Public Works Officer, who is the officer in charge of the contract, makes a written report to the Bureau of Yards & Docks that the work is completed; sets forth the facts and circumstances attending the completion, in reference to unavoidable delays, as far as he can determine, and asks the Bureau's instruction for the preparation of final vouchers and final releases. The Bureau considers that statement in connection with any claims that may have been submitted by the contractor for extra compensation or for extension of time by reason of unavoidable delays. Thereupon, the Bureau of Yards & Docks issues instructions for the preparation of final vouchers and final releases, and instructions as to how much liquidated damages, if any, are to be subtracted for delay in completion. The Public Works Officer prepares the final vouchers and final release in accordance with those instructions; sends that to the contractor, notifying him of the Bureau's instructions. It is then up to the contractor to sign the final voucher and release and return them to

the Public Works Officer. Such voucher is then signed by the Public Works Officer, if signed by the contractor; forwarded to the Bureau along with the original of the final release. It receives the Bureau's approval and signature, is returned to the station and check in payment prepared and mailed by the Disbursing Officer at the Station.

He further testified as follows (p 23):

Court: That is the official record?

Witness: Yes, sir. The original of the instructions from the Bureau to the Public Works Officer. I have a photo-print of the same, which can be compared with the original.

Court: I will take your word for it. That is the exact photo-print? A. Yes, sir.

Exhibit 18, photo-print of letter from Bureau of Yards & Docks to Navy Yard, Charleston, stamped with date April 16, 1920.

Cy-3-Wd- 1-6-21.

2469

NAVY DEPARTMENT
BUREAU OF YARDS AND DOCKS,
Washington, D. C.

April 16, 1920.

From: Bureau of Yards and Docks,

To: Navy Yard, Charleston, S. C.

Subject: Contract No. 2469 (Dept. No. 866), October 3, 1917, of R. H. Arnold Company for general storehouse, Navy Yard, Charleston, S. C.

Reference: (a) P. W. O. letter 2469-4, 12/26/19; forwarded by Comdt.'s indt. 23-2469, 71-4, 12/26/19.

1. The contract, of which a copy was delivered to the contractor October 9, 1917, required performance within 120 days thereafter; that is, by February 6, 1918. The building was substantially completed November 30, 1918, so as to allow the use of it by the Government, and that date will accordingly be treated as that of completion for the purposes of the damage clause, though the work was not then entirely finished and certain items of it were subsequently eliminated

from the contract. The entire delay of 297 days was, it is clear from reference (a), owing to causes for which the contractor is responsible, and accordingly liquidated damages therefor amounting at the rate of $50 a day, to $14,850, will be deducted from the stipulated price. Final payment under the contract on this basis is authorized.

(S) R. S. BAKENHUS,
Assistant to Bureau.

The contention of the plaintiff in error seems to be that there was no final settlement of the contract because (a) the final voucher was not sent to Arnold on April 16th nor (b) was it approved by the Bureau of Yards and Docks.

Commander Burrell testified that the final voucher had been prepared on April 17th, 1920 (pp. 29 and 30), that on April 20, 1920, he wrote Arnold advising him of the basis on which he had been instructed by the Bureau of Yards and Docks to prepare the final voucher and requesting payment of an item of $216 which Arnold owed the Government so that voucher might be forwarded, and requesting advice as to whether or not Arnold was prepared to execute the release on the voucher in accordance with the basis quoted. That he received no reply to this letter, although it was registered and the receipt showed delivery. He further testified that he wrote to Arnold repeatedly in regard to the matter (p. 30). Arnold's failure, therefore, to indicate an acceptance of the basis of settlement effectually put it out of the power of the government to proceed any further.

Nor could there be any approval of the final voucher by the Bureau of Yards and Docks until after Arnold had signed the release which was an integral part of it. Commander Burrell thus clearly puts it: (p. 22.)

"The Public Works Officer prepares the final voucher and final release in accordance with those instructions. It is then up to the contractor to sign the final voucher and release and return them to the Public Works Officer. Such voucher is then signed by the Public Works Officer, *if signed by the contractor;* forwarded to the Bureau along with the original release."

It thus clearly appears that after preparation of the final voucher no further action is taken on the part of the Government until after the contractor signs the voucher and executes the release. If plaintiffs' in error construction of the term "final settlement" is correct, it would put it absolutely within the power of the contractor to postpone indefinitely or even prevent any final settlement of the contract by merely refusing to sign the voucher or release or accepting the basis of settlement. If, as it happens in this case, the contractor had failed to pay his sub-contractors and the amounts of their claims greatly exceeded the amount due him from the Government, he could prevent such sub-contractors from pursuing their remedy under the Act against him and his surety by simply refusing to sign the voucher or to agree to a settlement.

A full and clear construction of the Act and its purposes and of the phrases "complete performance" and "final settlement" will be found in the case of *Illinois Surety Co. vs. United States*, 240 U. S., 214. In that case, the Court through Mr. Justice Hughes, said:

> "It was evidently the purpose of the Act of 1905 to remedy the defect in the Act of 1894 by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety, and priority with respect to such demand. *Mankin vs. United States*, 215 U. S., 533, 538, 54 L. Ed. 315, 317, 30 Sup. Ct. Rep., 174; *United States ex rel. Brown-Ketcham Iron Works vs. Robinson*, 130 C. C. A., 432, 214 Fed., 38, 39, 40. Accordingly it was provided that if the United States sued upon the bond, the described creditors should be allowed to intervene, and be made parties to the action, but subject 'to the priority of the claim and judgment of the United States.' And it was only in case the United States did not sue within the specified period that the creditors could bring their action. With this object in view—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (*United States use of Alexander Bryant Co. vs. New York Steam Fit-*

ting Co., 235 U. S., 327, 337, 59 L. Ed., 253, 257, 35 Sup. Ct. Rep., 108), it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement according to established administrative methods, had determined what amount, if any, was due. Then the government would have ascertained the amount of its claim,if it had one, and could bring suit if desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment, and, if payment were essential, there would be no date from which the time for the bringing of the creditor's action could be computed. * * *

"The pivotal words are not 'final payment,' but 'final settlement,' and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. See *United States vs. Illinois Surety Co.*, 195 Fed. 306, 309;*United States use of Chief All Over vs. Bailey*, 207 Fed., 782, 784; *United States ex rel. Brown-Ketcham Iron Works vs. Robinson* (C. C. A., 2d C.),*supra; United States use of Starrett-Fields Co. vs. Massachusetts Bonding & Ins. Co.*, 215 Fed., 241, 244; *United States use of John Davis Co. vs. Illinois Surety Co.* (C. C. A., 7th Cir.), 226 Fed., 653, 662. The word 'settlement,' in connection with public transactions and accounts, has been used from the beginning to describe administrative determination of the amount due. * * *

"We should not say, of course, that instances may not be found in which the word 'settlement' has been used in Acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning

as denoting the appropriate administrative determination with respect to the amount due. We think that the word 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six month period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained. As an administrative matter it does not depend upon the consent or agreement of the other matter to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision. * * *

"The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in the claims for material and labor supplied in the prosecution of work on buildings under the control of that Department (Dept. Circ. No. 45, Sept. 12, 1912), is as follows: 'The Department treats as the date of final settlement mentioned in these Acts' (Referring to Acts of 1894 and 1905, *supra*) 'the date on which the Department approved basis of settlement under such contract recommended by the supervising architect, and orders payment accordingly.' "

In the case of *U. S. vs. Robinson*, 214 Fed., 38; 130 C. C. A., 434, the records showed that the Supervising Architect of the Treasury made a report on July 1st, 1908, recommending final settlement of Robinson's contract and making certain deductions for overtime damages, just as in the case at bar. This was approved by the Secretary of the Treasury on February 10th, 1909. The Court held that a suit instituted after the expiration of six months and within one

year from February 10th, 1909, was not premature, using this language:

"The sole question to be determined here is the meaning of the phrase 'final settlement of the contract' between the original contractor and the government. Does it mean that all outstanding controversies between the government and the contractor arising out of the contract must be finally determined? Or is it sufficient if the government has officially indicated that it intends to make no effort to collect anything further from the contract or from the bonds? The statute is awkwardly and inartifically expressed, but it seems to us it may be easily construed by applying the well recognized rule of ascertaining first what was the difficulty to remedy which the statute was passed, and, second, what was the method adopted to remedy such difficulty. Under the old Act, the United States was exposed to a loss of the security it had provided to secure a proper execution of the contracts it had let, in cases where the contractor became insolvent. Subcontractors and materialmen, sometimes before the work was even near completion, could proceed independently to secure their pay out of the proceeds of the bond, thereby reducing it to such an extent that the government might get nothing. Manifestly this was improvident legislation and it was undoubtedly to remedy this difficulty that the Act was passed. The new Act provided in the first place that suit to enforce the bond should be brought by the United States and materialmen be allowed merely to intervene in that suit. There might, of course, be instances where the government, making no claim against its contractor to recover damages, would bring no suit on the bond. In that case the new Act provides that the materialmen may themselves bring such suit. The more important part of the new Act is found in the clauses which provide in substance that no materialmen shall take one dollar out of the fund which the bond produces, until every dollar due the United States under the contract shall be fully paid. Keeping these clauses in mind, it seems to us that a reasonable interpretation

of the disputed phrases is to be readily found. In determining the time when materialmen may begin suit it would not do to fix it at some day 'after complete performance' merely. Defective work, damages for delay and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date, was, therefore, fixed relatively to 'complete performance of the contract and *final settlement thereof.*' We take it that these italicized words refer to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not and records that decision in some orderly way. Six months after that date, materialmen may begin suit. This construction protects the government against the defect of the old Act, viz., that its suit to recover might prove barren, because the money is gone. We can see no reason why Congress should have provided that, when the government claims nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the government for having underpaid him reaches a conclusion. Such suit can in no way affect the funds provided by the bond out of which the government might have satisfied its claim, if it had any. In other words, we see no reason for holding that the final settlement must be mutual, in cases where the government makes no claim against the contractor. Under the statute whenever the government does make claim, it will be paid first, since the Act says: 'After paying the full amount due the United States, the remainder shall be distributed pro rata,' etc. The time fixed by the statute for beginning a sub-contractor's suit is any time within the period extending from six months after completion and final settlement to one year after completion and final settlement." * * *

"*What it had in mind was such a determination as to its rights* (Government's), *by the proper government officers, as might fairly be taken by all persons inter-*

ested as an authoritative announcement that the government was not a claimant to any part of the proceeds of the bond. When such a determination has been made and six months have elapsed thereafter, then the others interested in the fund may bring their suit." (Italics added.)

See also *U. S. vs. Winker*, 162 Fed., 401.
U. S. vs. Bailey, 207 Fed., 783.

In the case of *U. S. vs. Robinson* C. C. A. 2d Cir. 1918), 251 Fed., 461; 163 C. C. A., 637, the Court said.

"The word 'completion' in view of the purpose of the statute, and the attitude of the Courts in giving those purposes effect, must be construed as meaning that the contract was completed in the sense that the United States was satisfied that enough had been done to discharge the surety as to the United States. Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A sub-contractor who had performed his work would be compelled to wait for some indefinite period because some other sub-contractor, or the main contractor himself by reason of some default or dispute made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen that in a contract involving, as did the contract at bar, over a million dollars, a sub-contractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longed looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the sub-contractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract." *Robinson vs. U. S.* (C. C. A., 2d Cir., 1918), 251 Fed., 461, 163 C. C. A., 637.

And again, in the same case, the Court said:

"As between the United States and Robinson the latter may not be satisfied and may contest the position of the United States, as he is now doing in the Court of Claims; but such controversy on the facts in this case, the construction of the statute, the main contract and the sub-contracts, does not, in any manner affect the rights of the sub-contractors as against Robinson. So to hold is not to rewrite the contracts as between Robinson and the sub-contractors, as counsel earnestly contend, but is merely to give the language of the parties the meaning which they intended it should have, for they were referring directly to the contract with the United States with its necessary security and it is clear that the language thus used in the sub-contracts could never have been intended, in effect, to require the sub-contractors to waive their rights upon the bond, or to be postponed indefinitely after the United States had so acted as to discharge all liability on the bond against it and after the necessary six months had elapsed."

To the same effect see the case of *U. S. vs. Title Guaranty Co.*, (C. C. A., 7th Cir., 1918), 254 Fed., 958; 166 C. C. A., 320, wherein it was said:

"In the present case the building had been completed and the government had accepted the work and occupied the building prior to the date the final voucher was made out. The voucher was made out. The voucher was prepared by the Public Works Officer, who represented the government in the construction of the building. He termed his statement a 'final voucher.' Before sending [illegible] government he secured from the contractor a certificate of its correctness. It was then examined and approved by the acting chief of the bureau in charge of the construction.

"Made under these circumstances, when the building was fully completed, accepted and occupied by the government, at a time when the parties were concerned only in a final settlement of the contract, it is difficult to avoid the conclusion that the date of the approval

of this voucher constituted the date, from which the six months period ran. There may be a final settlement between the government and the contractor so as to fix the rights of a creditor under this Act notwithstanding the balance may be subject to change * * * *We conclude that in cases where the government has clearly indicated that it has no claim against the surety, a final settlement within the purview of this Act has taken place.*"

Counsel for plaintiffs in error devoted approximately one-half of their printed argument in the Court below in an attempt to demonstrate that certain items appear on the voucher mailed Arnold in September that do not appear on any previous voucher. They suggest the inference that the government first fixed or took into account these items in September and hence there could have been no final settlement in April. But the testimony of Commander Burrell clearly and unequivocally refutes this theory. He testified (p. 24) that he had been Public Works Officer at the Charleston Navy Yard since January 5th, 1920. That the letter authorizing final settlement was placed in his hands. That all but the last page of the final voucher was typed in April, 1920, after receipt of the letter of April 16th from the Bureau of Yards and Docks (pp. 29 and 30). The last page of the voucher contained two items which Arnold owed the government, one amounting to $216.10, and the other to $19 (pp. 30 and 31). That he had written Arnold under date of April 20th requesting payment of this item so that final voucher might be forwarded. (Ex. 18, p. 47.) That he received no reply to that letter (pp. 24 and 25) and subsequently in September under authority of the Bureau of Yards and Docks he deducted the items on the last page of the final voucher. He testified that the amount due Arnold was computed in April, that the settlement was made on the basis of the letter of April 16th from the Bureau, that the voucher was made up and the only thing done thereafter was to deduct the items amounting to $235.10 when Arnold failed to send check. (See pp. 29, 30, 32 and 33.) Surely this clearly shows that the government through its proper

officers had determined the amount due Arnold in April. Surely it shows that at that time the government "had ascertained the amount of its claim, if it had one, and could bring suit if it desired," which is the test laid down in *U. S. vs. Illinois Surety Co.*, 240 U. S., 214, *U. S. vs. Title Guaranty Co.*, 254 Fed., 958 and in *U. S. vs. Robinson* (C. C. A. 2d Cir.), 214 Fed., 38.

Was it necessary to communicate the figures to Arnold in order to fix the date of final settlement, as plaintiffs seem to contend? Does there have to be an agreement on the part of the contractor? Must the settlement be mutual? The Supreme Court in the Illinois Surety Company case says not in this language:

> *"It (final settlement) does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended or held in abeyance by refusal to agree.* Whether the amount so fixed is due in law or fact undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision."

Again in *U. S. vs. Title Guaranty Surety Co.* (C. C. A., 7th Cir.), 254 Fed., 958, where the Court says:

> "There may be a final settlement between the government and the contractor so as to fix the right of a creditor notwithstanding the balance may be subject to change."

In this connection, the attention of the Court is invited to the case of *United States vs. R. H. Arnold and Globe Indemnity Company*, 268 Fed., 130. That case is from the District Court of Connecticut, and is practically identical with the case at bar. The letter relied upon to show final settlement in that case is practically the same as the one relied upon in the case at bar. In that case also, Arnold refused to sign the final voucher, and it accordingly never

went back to the Bureau of Yards and Docks for approval there. In that case also there was certain correspondence between Arnold and government officials after the letter authorizing final payment, and in that case also the government deducted certain items from Arnold's account after the date of final settlement. The identical points as to final settlement which are raised by Arnold in this case were raised by him in that case and were decided against him by Judge Thomas.

DEPARTMENT CONSTRUCTION.

The weight to be given a departmental construction of a doubtful statute seems to be embodied in the following rule:

"We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution."

U. S. vs. Cerecedo Hermanos Y. Co., 209 U. S., 339.
See also *Jacobs vs. Prichard*, 233 U. S., 214.
U. S. vs. Hammers, 221 U. S., 225.
U. S. vs. Illinois Surety Co., 240 U. S., 214.

The administrative or departmental construction placed on the term "final settlement" is set forth in Dept. Circ. No. 45 (192) of the Treasury Dept. as follows:

"The department treats as the date of final settlement mentioned in said Acts the date on which the department approves the basis of settlement under contract recommended by the supervising architect and orders payment accordingly."

Again, defendant in error introduced in evidence a copy of the contract and bond certified under the seal of the Treasury Department. Such copies are not furnished creditors desiring to bring suit under this Act until after the expiration of five months after final settlement. Circular letter No. 36 of the Treasury Dept., dated April 4th, 1916, contains the following:

"A claimant who wishes to enter suit upon the bond of a contractor who has executed a formal contract and bond, and to be furnished with certified copies of such instruments, must file with the department the affidavit required by the Act of August 13, 1894 (as amended), setting forth that he has supplied material or labor in connection with the Federal building and has not been paid therefor. Such application must be made (or renewed) not earlier than five months after the authorization of final settlement, the date of which authorization will be communicated when made to those claimants who have notified the department of their claims.

"This postponement of the furnishing of the certified copies of the contract and bond for the suit upon the bond is because under said Acts the claimant cannot sue the contractor and his surety until six months after such final settlement, and such copies are withheld for said five months because in the meantime the claim may be disposed of and the labor of making such copies be, therefore, avoided. If the United States should institute suit against said contractor within six months next following such final settlement, the claimant would be notified of such suit and the desired certified copy forwarded upon notification to the department of the renewal of the application therefor."

Hence, it is not only clear that in the opinion of the Department final settlement had been authorized in April for the certified copies were not furnished until more than five months later, but the very fact that the government furnished the copies to a creditor for the purpose of bringing suit clearly indicates that the government had no intention of suing.

How, then, are plaintiffs in error hurt? The six months' provision, as has been demonstrated, was not for their benefit, but for that of the government. But the government, by furnishing the means of suit to a creditor, says, in effect: "I am not going to sue, as I have no claim on the bond. You have waited the six months in which the law gives me the prior right. Here is a copy of the contract and bond upon

which you may bring suit. My demands have been satisfied." When the government, for whose benefit the provision was made, says there has been a final settlement, will the contractor, whose substantial rights cannot possibly be prejudiced, be heard to say the contrary? If so, the "beneficent object of the statute" is defeated.

The position taken by plaintiffs in error is technical in the extreme. No question is made that Guimarin & Co., is not rightfully due the money remaining on their contract. In fact, plaintiff in error did not even put a witness on the stand. For two years they gave only evasive answers to Guimarin's demand for payment, but never denied the justness of his account. They did not deny it at the trial. And yet if this Court should hold that this suit was premature, not only may Guimarin lose his $9,000.00, should Arnold prove to be insolvent, but the other claims will fall as well. For, if it should be held that the final settlement was in September, the time for bringing another suit will have long since expired. The surety will be released absolutely, and if Arnold is sued in his place of residence he might successfully raise the statute of limitations of that jurisdiction as to the intervening claimants. Thus would the payment of admittedly just claims involving many thousand dollars be avoided.

Should Judge Smith have held that final settlement was in September and another suit had been brought by the sub-contractors on that theory, we have no doubt that plaintiffs in error would have just as strenuously contended that final settlement was in April as they now insist it was in September. Certainly it was never intended that this Act could be so construed as to place a beneficiary under its terms between any such Scylla and Charybdis.

EVIDENCE.

(a) Assignment of Error No. 4 (p.) complains of the admission of Exhibit 18. It will be seen from the Transcript of Record, page 23, and from the Index that Exhibit 18 is a letter from the Bureau of Yards and Docks, Washington, D. C., to the Public Works Officer, Charleston Navy Yards,

Charleston, S. C. It was an original letter, introduced in evidence through the Public Works Officer, Commander Burrell, but through error was not printed in the Transcript among the Exhibits, though counsel for plaintiffs in error had it printed as an addendum on their attention being called to the oversight. The oversight was probably occasioned on account of the similarity of the letter from the Charleston Navy Yard to Arnold, erroneously set out as Exhibit 18 in the Transcript, in which the original letter was quoted. It is clear, therefore, that counsel, in his assignment of error still labors under a misapprehension, though attention was fully called to the fact in the Court below.

(b) Complaint is made of the introduction of a carbon copy of statement mailed to Arnold & Co., by Guimarin. A notice to produce duly served on counsel for Arnold required the production of "all correspondence between R. H. Arnold & Co. and W. B. Guimarin & Co." How, then, can they complain of secondary evidence?

(c) Complaint is made of the introduction of letters from R. H. Arnold & Co., to Guimarin & Co., signed by A. F. Rosenheim, Office Manager, because of failure to show authority on the part of Rosenheim to sign them. The letters were on the letterhead of R. H. Arnold & Co. Mr. Guimarin testified (pp. 21 and 22) that he met Mr. Rosenheim in Arnold's office in Washington and that he thought he was the bookkeeper. That he was sitting in the office working at a desk. Mr. Heyward, of the firm of Guimarin & Co., testified as to a number of letters, which were put in evidence, signed by A. F. Rosenheim, which he received in due course of mail. The correspondence itself as set out in the transcript shows at least *prima facie* that Rosenheim was Arnold's agent. No attempt was made by Arnold at the trial to show that Rosenheim was not Arnold's agent although Mr. Stum, his auditor, was present at the trial.

(d) With regard to letters signed R. H. Arnold & Co., by Ralph E. Homann, suffice it to say that Mr. Homann's name appears on the letterhead as an apparent member of

the firm of R. H. Arnold & Co. In addition, Mr. Guimarin testified (p. 19) that he knew Mr. Homann and that he was the representative of the contractor on the ground.

(e) As to Mr. Stum, he was present in Court, and could certainly have disavowed his agency and authority if he had possessed neither.

PROOF OF SUB-CONTRACT.

Complaint is made that the District Court erred in admitting the sub-contract between Arnold and Guimarin in evidence upon the ground that there was no proper proof of Arnold's execution. It will be observed that Arnold's answer admits the execution of the paper. The Globe Indemnity Co. merely denied any knowledge of the sub-contract. The denial was insufficient, as pointed out by Judge Smith at the trial, on account of its failure to conform to Sec. 199 of the S. C. Code of Civil Procedure. That section is as follows: "The answer of the defendant must contain: 1. A general denial of each material allegation of the complaint controverted by the defendant, *or of any knowledge or information sufficient to form a belief.*" As was said in the decree of the Circuit Judge, in the case of *Land Mortgage Co. vs. Williams*, 35 S. C., 370, the Supreme Court affirming the same: "Under our Code it is only when a defendant has neither *knowledge* nor *information* to enable him to form a belief on the subject that he can controvert an allegation under this provision. Here the defendant states that he 'has no personal *knowledge* of the fact stated,' but does not allege want of *information* as to the facts alleged."

Aside from that, however, the paper was not such an instrument as required attesting witnesses and, hence, under the law of South Carolina it was not necessary to prove the same by one who had witnessed its execution. In the case of *Swancey vs. Parrish*, 62 S. C., 240, the Court, through Mr. Chief Justice McIver, said:

> "As to the first question, we think it clear that the Circuit Judge erred in ruling out the paper marked

Exhibit No. 2, purporting to be a chattel mortgage, upon the ground that the testimony of the subscribing witness was not offered to prove its execution. In the first place, at the time the transaction out of which this controversy arose there was no law requiring that a chattel mortgage should be executed in the presence of a subscribing witness (*Talmadge vs. Oliver*, 14 S. C., 522, and *McGowan vs. Reid*, 27 S. C., 262); and even if, as is suggested in the argument, the law has since been changed by statute, surely such statute could not affect a mortgage executed several years prior to its passage. If, then, the law did not require this mortgage to be executed in the presence of a subscribing witness, it would seem that this case does not fall within the rule applying to certain papers which must be executed in the presence of subscribing witnesses. This view seems to have been taken in the case of *Hall vs. Phelps*, 2 John., 451."

See also 21 R. C. L., 457.

In addition, Mr. Heyward testified that he had received a great many letters from Mr. Arnold and was familiar with his signature. That to the best of his knowledge Mr. Arnold had signed it. (P. 13.)

Counsel cited below the case of *Kolb vs. Jones*, 62 S. C., 193, as authority for the proposition that Arnold's admission of the sub-contract could not affect the surety. That case is not authority for any such principle. It merely holds that a quit-claim deed by several grantors may be introduced in evidence upon proof of execution by one of the grantors. The Globe Indemnity Company was not a party to the contract between Guimarin and Arnold. Surely written evidence of liability in the handwriting of the principal, and the execution of which is admitted by the principal, is admissible evidence against the surety and proves at least *prima facie* liability on its part. 21 R. C. L., 1092.

"Accounts, entries and written statements by the principal are *prima facie* evidence against his sureties, —32 Cyc., 137,—and in some States conclusive," cit-

ing *State vs. Teague*, 9 S. C., 149, and *Treasurer vs. Bates*, 2 Bail., 362.

All of the cases cited below by plaintiffs in error were inapplicable to the case at bar. Most of them involve deeds, requiring, of course, proof by attesting witnesses.

VARIANCE.

Counsel assumes in assignments of error 4 (o) and 4 (r) that the sum allowed Guimarin in the verdict is the same as the sum allowed Arnold by the Government for certain "extras" performed by Guimarin. Counsel clearly mistakes the facts. The record discloses three "extras" done by Guimarin, being termed "Changes C. D. & F" (pp. 26, 27 and 28). The record shows that in each instance Arnold notified Guimarin that the Government desired certain changes in the work and requested Guimarin to submit estimates covering the same. Guimarin made the estimates and submitted them to Arnold who, *prima facie* at least, agreed that the estimates were the basis for doing the work. (See Heyward's testimony, pages 15, 16, 17 and 18, and Exhibits 10, 11, 12, 13 and 16.) Change "C" amounted to $293.65. (See Ex. 2.) Mr. Guimarin testified (pp. 20 and 21) that the extra was done upon the basis of his estimate and was a fair value for the work done. He testified to the same effect as to the other changes. Change "D" amounted to $3,383.50 (Ex. 2), and change "F" to $29 (Ex. 2.) While Guimarin contended that the estimate furnished by him to Arnold and his acceptance of same estopped Arnold to deny that the amounts were not proper, in order to show further that the amounts charged Arnold by Guimarin were fair values in accordance with the sub-contract, Commander Burrell was permitted to testify that on Change "C" the government paid Arnold $290.95 (pp. 26, 27, 28). On Change "D" the government allowed Arnold $3,721.85, although Guimarin's charge was only $3,383.50 (p. 28), and on Change "F" the government allowed Arnold $61.05, Guimarin's charge being $29 (p. 29). This was certainly evidence of high probative value and Arnold did not make

the slightest attempt to show that the charges for the changes were not at a fair valuation. The evidence shows further that Arnold was allowed by the government for these extras performed by Guimarin the total sum of $4,073.85, while Guimarin charged Arnold only $3,706.12, or to put it differently that Arnold received a profit of approximately 10 per cent. on the work performed wholly by Guimarin. Will he now be heard to say after two years' silence and in the face of the proven facts that the "valuations" were not "fair?" He had an opportunity on the trial to prove to the contrary, but contented himself with not swearing a single witness.

ACCEPTANCE..

Not one scintilla of evidence was offered that Guimarin's work was not done in a workmanlike and acceptable manner. Under date of Dec. 6th, 1918, Guimarin wrote Arnold, in part as follows: (Ex. 19.)

> "We also wish to advise that we have completed this contract and extras, but the government representative refuses to accept it until the building is completed. We, therefore, drained all the pipes, put salt in the traps to keep them from freezing and left the work in care of your superintendent."

Is not Arnold's silence for two years, in the face of this letter ample evidence of acceptance, which, unrebutted, becomes conclusive? In addition, while the Court held that proof of acceptance of the building was perfectly immaterial (p. 25), it permitted Commander Burrell to testify that the building has been in use for over a year prior to the final audit of Arnold's accounts in April, 1920. Counsel seems to argue that because the government penalized Arnold for delay, Guimarin must suffer notwithstanding his work had long since been completed. Be that as it may, however, the letter from the Bureau of Yards and Docks to the Charleston Navy Yard (Ex. 18) shows that the building was accepted by the government on November 30th, 1918.

The statement was made in the Court below by plaintiffs in error that a deduction of $6,457.50 was made on the final voucher for unfinished work. An examination of the voucher will show (p. 53) that this was a credit taken by the government on account of Change "H." Evidently, therefore, it is not for unfinished work, but a deduction made in accordance with the contract on account of the elimination of certain work contemplated in the original contract. Be that as it may, however, no claim is made that any of Guimarin's work was unfinished and surely the contractor would not be heard to say that Guimarin's money was not due because the government had some claim against him—the contractor—on account of his own default. The principle that a party may not take advantage of his own wrong would seem to be applicable.

STATED FACTS.

On December 19th, 1918, Mr. Heyward prepared a statement of Arnold's account which was mailed to him (p. 15) and in due course received an acknowledgment by letter dated December 21st. (Ex 3.) It is true that the writer said he had "no authority to act in the matter," but the context shows that he merely meant that he could not pay the account during the absence from the city of Mr. Arnold and Mr. Homann. He goes on to say, however, that the statement "will doubtless receive prompt attention upon their return the early part of January."

The record shows a constant stream of letters from Guimarin & Co., from that time on demanding payment on the part of Arnold. The replies do not question the correctness of the account, but merely evade the issue on the ground that the government had not signified an official acceptance of the building. As was pointed out, however, by Mr. Heyward in his letter to Arnold of April 26th, 1919 (Ex. 8), Arnold had received from the government the money for the work performed by Guimarin, which fact was borne out by the government records. This fact was not questioned by Arnold, and yet the duty rested upon him to speak then

if he was to speak at all. If profound silence ever amounts to acquiescence it assuredly does in this case.

Certain assignments of error complain of failure of proof of authority of Arnold's employees to sign certain letters in evidence. They were on Arnold's letterheads and were signed by persons proved to be in his employ and one of whom was apparently his partner. Certainly this was *prima facie* proof of authority requiring rebuttal on Arnold's part.

REFERENCE TO MASTER.

The assignments of error under this head have become academic in view of the modification of the judgment of the District Court. The case of *Miller vs. Bonding Co.* (*supra*), had not been decided when this case was tried and Judge Smith only followed the well established practice in South Carolina. The Circuit Court of Appeals having held that plaintiffs in error are entitled to a jury trial as to the intervening claims, we are at a loss to understand wherein they still feel aggrieved, especially as the penalty of the bond is considerably in excess of all claims. Guimarin's claim having already been tried before a jury, nothing would be gained by sending it back for a re-trial.

CONCLUSION.

In the recent case of *Illinois Surety Co. vs. John Davis Co.*, 244 U. S., 376, the Court used this language: "In every case which has come before this Court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

In the case at bar, Guimarin furnished the materials and performed the work contemplated by the sub-contract with Arnold. For approximately four years he has been kept out of the money which he expended. The government has

not only paid Arnold for the labor and material furnished by Guimarin, but has paid him a profit on it. Or to put it differently, for four years Arnold has been using Guimarin's money.

Is any evidence offered that Guimarin did not furnish the materials and labor? Is any evidence offered that his work was not entirely acceptable? Would the government have paid Arnold for it if it had not been acceptable? Is there anywhere any question made as to the correctness of Guimarin's account? Whose actions in this matter should more commend them to this Court—Guimarin, who proves a just claim, or Arnold, who does not offer a single witness?

It is earnestly submitted that Arnold and his surety should not be permitted to escape the payment of a concededly just claim upon a technicality. When the party most interested, the government, for whose benefit the provision was made, informs Guimarin that the contract of Arnold has been "finally settled" and that he may bring his suit, will Arnold be heard to say the contrary? Is the phrase "final settlement" to be made a screen behind which a recalcitrant debtor may hide? Must a creditor under the act rely upon the word of the government at his extreme peril? If so, the act is a pit-fall instead of a refuge and penalizes those whom it was intended to protect. In our judgment this case is controlled by the principle announced by this Court in the case of *Alexander Bryant Co. vs. N. Y. Steam Fitting Co.*, 235 U. S., 327, when it said:

> "The Act is intended to be highly remedial. Its purpose is simple and beneficial. It is to give a remedy to materialmen and laborers on the bond of the original contractor, and a reasonable time to enforce it."

Respectfully submitted,

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